REMARKS ON THE NOTION OF "BONA FIDES"*

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As result of a recent amendment to the many times modified Hungarian Civil Code of 1959, namely due to the Act No. III of 2006 the distinction between the "bona fides" (hereinafter: *b. f.*) in the *objective* sense (to be understood as a requirement arising from the principle of good faith and fair dealing) on the one hand, and the so-called *subjective b. f.* (in terms of an error concerning the lawfulness of a legal situation) on the other hand has been rendered unambiguous in Hungarian civil law by means of correction of the relating terminology.[1]

This legislative correction of the Hungarian legal terminology was already maturing for more than a decade. In the Hungarian legal literature it was the late professor László Gáspárdy who — after the re-introduction of the principle of good faith and fair dealing in Hungarian civil law, namely after its substitution for the corresponding socialist principle by an amendment to the Civil Code in 1991 — first called attention to the fact that good faith as an objective system of requirements is not to be confused with the subjective good faith being present especially in the law of things.[2] Since 2001 professor Lajos Vékás has emphasised several times the importance of the distinction in ques-

* The present study — being at the same time a review about *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea. Atti del Convegno internazionale di studi in onore di Alberto Burdese* [a cura di LUIGI GAROFALO], I—IV, Cedam, Padova 2003, 578+578+608+581 pp. (and additional pages paginated with Roman numerals in the beginning of each volume) — has been written in the framework of the project OTKA K 60756. The author owes thanks to Professors Gábor Hamza and Péter Takács as well as Dr Norbert Csizmazia for their useful advice.

1 See §§ 2 and 5 in the Act No. III of 2006, which provided for the modification of § 4 and 209/B of the Hungarian Civil Code (Act No. IV of 1959). The official motivation of the bill lays down *expressis verbis*: "The notion of *jóhiszeműség és tisztesség* ('good faith and fair dealing') represents an objective system of requirements that has an ethical colour, and it is not to be confused with the notion of the subjective *jóhiszeműség* ('good faith'), which refers to a certain person's state of mind and is relevant basically in the law of things." See Igazságügyi Közlöny [= Official Journal of Ministry of Justice of Hungary] 2006/1, p. 258. In relation to the modification of § 209/B of the Hungarian Civil Code see also the fn. 48.

2 L. GÁSPÁRDY in: F. Petrik (ed.), Polgári eljárásjog. Kommentár a gyakorlat számára [= Law of civil procedure. A Commentary for the practice], Budapest 1994, 21.

tion.[3] The Concept of the new Hungarian Civil Code, published as an attachment to the Government Decision No. 1009/2002 (I. 31.) also called attention in a refined way to the fact that the principle of good faith and fair dealing is not identical with good faith in the subjective sense. The Draft of the new Civil Code for Hungary published in 2006 reflects this dualistic approach to *b. f.* as well.[4]

The dualistic concept of *b. f.* is for the German jurists as necessary as the distinction between law and right is a matter of course for the English jurists. Like in English language there is no overall term to designate both aspects of *ius* (*droit, Recht, diritto*, etc.), in German language an overall term to designate both aspects of *bona fides* (*bonne foi, buona fede* etc.) is missing. The dualistic concept of *b. f.* prevails also in many other legal systems, e. g. in Swiss, Italian and Dutch law being expressed by the relating terminology as well.[5]

There are, however, a number of legal systems in which various *monistic* concepts prevail. The monistic concepts can be classified, *grosso modo*, into two groups, namely distinguishing the more traditional subjective monism and the more modern objective monism. Under the *subjective monistic* view *b. f.* is a homogeneous category and means always a subjective state of mind. This concept prevails traditionally in French civil law and it is terminologically reflected by the uniform French term *bonne foi*.[6] Also under the *objective monistic* view *b. f.* is a homogeneous category but it always means an objective sys-

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3 See e. g. L. VÉKÁS, in L. Vékás & M. Paschke (hrsg.), Europäisches Recht im ungarischen Privat- und Wirtschaftsrecht, Münster 2004, p. 28, fn. 104. Even if with my modest means only, also I was striving to call attention to the dichotomy of *b. f.* and in this way to contribute to the spreading of the dualistic approach to *b. f.* in Hungarian legal thinking since 1996, see A. FÖLDI & G. HAMZA, A római jog története és institúciói [= History and institutes of Roman law], Budapest 1996, marginal number 597; A. FÖLDI, Kereskedelmi jogintézmények a római jogban [= Commercial institutions in Roman law], Budapest 1997, 242ff.; A. FÖLDI, A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig [= The principle of good faith and fair dealing. An outline of its history from Roman law until our time], Budapest 2001, 118 p.; A. FÖLDI, A másért való felelősség a római jogban [= Vicarious liability in Roman law], Budapest 2004, p. 229, fn. 1.

4 "During the enforcement of rights and performance of duties the parties are obliged to act in accordance with the requirement of good faith and fair dealing". See Polgári Törvénykönyv. Javaslat. Normaszöveg és indokolás [= Draft of a Civil Code for Hungary], Budapest 2006, § 1: 3. See also the official motivation of § 5: 77 thereby. Nevertheless cp. fn. 64.

5 As for the terminology, see the fn. 26.

6 In the recent Italian literature G. MERUZZI, L'exceptio doli. Dal diritto civile al diritto commerciale, Padova 2005, 160 refers to the fact that pushing into the background and subjectivisation of the *bonne foi* in France was due to the positivism and liberalism of the 19th century. This view has still strong position in the present-day French legal thinking as well as in many Latin American legal systems, see R. CARDILLI, 'Bona fides' tra storia e sistema, Torino 2004, 67ff. See furthermore D. TALLON, Le concept de bonne foi en droit français du contrat, Roma 1994.

tem of the requirements of fair dealing. This view is dominant in Austrian law and it is terminologically reflected by the uniform Austrian term *Redlichkeit* ('honesty').[7]

These concepts of *b. f.* emerged since the middle of the 19th century, when some German pandectists realised the complexity of the *b. f.* Since the beginning of the 20th century and especially in the last decades the spreading, or even the prevalence of the dualistic approach is observable in a number of legal systems.[8] Nevertheless considerable arguments can be offered also for the objective monistic view prevailing in some contemporary legal systems (e. g. in Austrian law). As far as the subjective monistic concept is concerned, it still exists in several legal systems, it seems, however, to be more and more weakening and can surely be regarded as out of date.

Due to the Act No. III of 2006 the view of those Hungarian jurists representing the subjective monistic approach to *b. f.* became *de lege lata* out of date.[9] However, since it is not the legislation that decides about scientific truths, this recent development of Hungarian legislation, which filled me otherwise with pleasure, inspired me to take in hand again the proceedings of the international conference on *b. f.* held in Padua in 2001, published in 2003, and to think newly about the questions of the monistic and dualistic approaches to *b. f.* In the present review I wish to expose the results of this meditation.

The University of Padua, personally professor *Luigi Garofalo* and his colleagues organised an international scientific conference entitled "Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea". The conference was held between the 14th and 16th of June 2001, in honour of the

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7 For the Austrian law see fn. 55. The distinction between the dualistic and monistic concepts as sketched above is of course only a rough reflection of a much more complex reality. I refer hereby only to the fact that there are significant differences among the solutions of those legal systems accepting the dualistic approach to *b. f.* since the requirements for the rebuttal of the presumption of good faith are different, see more thoroughly below (fn. 64).

8 For the recent trend in Italian civil law towards the strenghening of objective *b. f.* — and in this way towards the weakening of the traditional subjective monism — see MERUZZI (cit. fn. 6), 165ff. For a similar tendency in Spanish law see M. HESSELINK, De redelijkheid en billijkheid in het Europese privaatrecht, Deventer 1999, p. 27, fn. 44. For the dualism manifesting itself in Chilean *Código civil* see CARDILLI (cit. fn. 6), 73ff. See furthermore K. BALODIS, The role of the good faith principle in the contemporary civil law of Latvia, in: Law and Justice [Riga] 2003, 2ff.

9 F. PETRIK in: F. Petrik (ed.), Polgári jog. Kommentár a gyakorlat számára [= Civil law. A Commentary for the practice], 2nd ed., Budapest 2002, I, 17f., representing the subjective monistic view, thinks that the expression "good faith and fair dealing" in § 4 of the Civil Code should not be a hendiadyoin but it should cover two different categories. In Petrik's opinion the "good faith" should be also in the general clause in question a subjective element as opposed to "fair dealing" being a moral concept.

internationally renowned professor of Roman law in the University of Padua, *Alberto Burdese*. During the sessions, which took place on the first day in Padua, on the second day in Venice, and finally on the third day in Treviso, more than 70 papers were delivered altogether. The proceedings of the conference edited by *Luigi Garofalo* were published two years later and contain the written version of more than 80 papers by Italian, Spanish, German, Austrian, Swiss, Polish, Russian, Hungarian, Argentine, Brazilian, Chilean and Israeli romanists and civilists, as well as by some other Italian legal scholars. The papers written mainly in Italian, furthermore in Spanish, English, German, French and Portuguese languages follow each other in alphabetical order of the authors' names.

The title or the subject of a scientific conference or a volume of papers respectively usually do not involve a strict obligation for the participants to conform to the central topic.[10] However, we can see with pleasure that the overwhelming majority of the papers in the "Atti Convegno Burdese" deals with the central topic, namely with the (objective) *b. f.*, or are closely related to it. The pleasing fact that there are also a few beautiful essays appreciating professor Alberto Burdese's personality and work, does of course not affect the thematic unity of the volumes.[11] A complete list of Alberto Burdese's scientific publications can also be found in volume I (pp. 36—51).[12] I do not wish to mention it

[10] Papers which are outside the central topic are as follows: G. HAMZA, Did private international law exist in the "Imperium Romanum"? (Reflections on a "vexata quaestio"), vol. II, 323—331; R. LAMBERTINI, Lucrativa usucapio, vol. II, 365—376; P. ZILIOTTO, Vendita con 'lex commissoria' o 'in diem addictio': la portata dell'espressione 'res inempta', vol. IV, 475—515; J. ZLINSZKY, Konzept mit Begründung zum Kapitel des ungarischen Bürgerlichen Gesetzbuches über zivilrechtliche Haftung, vol. IV, 517—539. Although the paper of C. VENTURINI, 'Bis idem exigere' e 'corruptio servi': un'ipotesi particolare, vol. IV, 403—437, begins with a passage from Gaius referring to *b. f.* (D. 50.17.57), it is linked to the subject matter only in a wider sense. The paper of J. GARCÍA SÁNCHEZ, La buona fede negli articoli 375 e 379 del Codice civile spagnolo, vol. II, 203—239 written in Spanish language (in spite of the Italian title) is dealing mainly with the role subjective *b. f.* plays in some Spanish rules concerning the acquisition of ownership (there is also an outlook to Roman law, see p. 233, fn. 80). Strictly speaking the papers by VÖLKL and ZANNINI are also outside the thematic scope of the conference but they chose their topic on the basis of an objective monistic approach to *b. f.*, see fn. 40 and 56 respectively.

[11] G. MARCHESINI, Saluto inaugurale, vol. I, 5—6; L. LABRUNA, Libertà e autonomia nell'Università. Lettera ad Alberto Burdese, vol. I, 7—10; A. GRECO, Il nostro preside Alberto Burdese, vol. I, 11—12; S. ROMANO, Anno accademico 1943-44: Alberto Burdese matricola della facoltà torinese di giurisprudenza, vol. I, 13—25; L. GAROFALO, Alberto Burdese: tratti di un Maestro (e suoi scritti), vol. I, 27—35; F. P. CASAVOLA, Per Alberto Burdese, vol. I, 57—59; D. DE POLI, Alberto Burdese e la facoltà giuridica patavina a Treviso, vol. I, 137—138. Professor BURDESE's grateful words can be read at the end of the last volume (Ringraziamenti, vol. IV, 579—581).

[12] The list begins with a treatise published in 1948 (A. BURDESE, La menzione degli eredi nella 'fiducia cum creditore', Studi in onore di S. Solazzi, Napoli 1948), and ends with those works of the master of Padua which were still in press in 2001.

critically but it would have been undoubtedly very useful to provide the beautiful and substantial volumes also with an index of sources.

Within the present review I cannot undertake to make known the extremely rich content of the four volumes amounting to about 2400 pages altogether, not even in outline. What I wish to show hereinafter is basically just one aspect: how the individual authors opine about the dualism of "buona fede oggettiva" and "buona fede soggettiva".[13] Although this dualism is suggested also by the title of the volumes under review, it is very far from being unproblematic.

The history of the development of this distinction is an interesting question also in itself, however, surprisingly little is known or at least reflected about it even by those researchers dealing with *b. f.*[14] The attributes "objective" and "subjective" are not often attached to the term *b. f.* either in Roman law or in civil law literature. Nevertheless their appearance might cause certain misunderstandings.[15] The attentive reader can notice some signs of this problem even in the proceedings of the conference in Padua. Thus the choice of the topic of the conference cannot be regarded as banal at all. The topic of the volumes edited by Luigi Garofalo constitutes much rather a scientific challenge. The subject-matter is namely a modern and at the same time a problematical category of

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[13] Even if I did not have the opportunity to add meritory remarks to all of the papers included in the four volumes, the reader will find the bibliographic data (author's name, title of the study, number of the relating volume and of the pages) of each of the papers in the footnotes below, as a matter of course without a repeated indicating of the title of the proceedings.

[14] This fact is especially strange if we consider that the recent Roman law (as well as civil law) literature of *b. f.* is immense ("eine unüberschaubare Literatur", as ascertained by D NÖRR, Römisches Recht: Geschichte und Geschichten, München 2005, 13). To list only a few of the relevant works published since the publication of the proceedings of the conference in Padua, see CARDILLI (cit. fn. 6); E. STOLFI, Bonae fidei interpretatio, Napoli 2004 (with a short reference to Zannini's view accepting it, p. 8, fn. 12); L. GAROFALO (cur.), L'eccezione di dolo generale. Diritto romano e tradizione romanistica, Padova 2006; CH. KRAFT, "Bona fides" als Voraussetzung für den Eigentumserwerb durch "specificatio" TR 74 (2006), 289ff.; A. METRO, 'Exceptio doli' e 'iudicia bonae fidei', to be published in Studi in memoria di Gennaro Franciosi, see www.unipa.it/~dipstdir/pub/annali/2006/Metro.pdf. The problem of distinction between the objective and the subjective *b. f.* is thoroughly dealt with, however, by A. SÖLLNER, "Bona fides" — guter Glaube?, SZ 122 (2005), 1ff. As to the recent civil law literature on the *b. f.*, see e. g. the bibliography by F. RANIERI, Europäisches Obligationenrecht, 2nd ed. 2003, 663; see more recently CARDILLI (cit. fn. 6); GAROFALO (cit. in this fn.); R. FIORI, Bona fides. Formazione, esecuzione e interpretazione del contratto nella tradizione civilistica, parte prima, in: Modelli teorici e metodologici nella storia del diritto privato, II, Napoli 2006, 127ff. See also J. PICO I YUNOI, El principio de la buena fe procesal, Barcelona 2003. In the recent civil law literature it is e. g. MERUZZI (cit. fn. 6), 176ff. who deals with the problem of the distinction in question more thoroughly than many other authors do. An exceptionally clear but at the same time somewhat exaggerated dualism manifests itself in the study of BALODIS (cit. fn. 8), 2ff.

[15] The question in the title of a study by R. SACCO, Cos'è la buona fede oggettiva? (in: Il principio di buona fede, Milano 1987) seems to be still timely.

civil law dogmatics which encourages us to carry out research in the field of the comparative history of legal dogmatics. In any case I deem it reasonable to briefly sum up first of all these problems, and so to start by laying down certain premises for the present review.

The original Roman category of *fides*, as pointed out already by *Bruns* and *Fraenkel*,[16] had nothing to do with the subjective belief of a person. *Fides* meant originally much rather 'truthfulness' and thus 'honesty'. The fundamental meaning of the word had therefore an objective and ethical colour. This objective meaning was completely in accordance with the application of the term *fides bona* in the *formulae* of the praetorian *bonae fidei iudicia*. In this way a certain kind of "*b. f.* of the law of obligations" was developed in pre-classical Roman law.[17] Later, however, as the *b. f.* of the possessor came into prominence, it became possible to regard the *b. f.* in this respect as a more or less subjective requirement (e. g. as an error concerning the lawfulness of possession), and many passages in the sources (e. g. Gai. Inst. 2.43, Paul. D.18.1.27) point to that, indeed.[18] A diffused view in the contemporary Roman law literature (e. g. *Hausmaninger*) holds that the subjective approach to the possessor's *b. f.* is traceable already in the classical Roman law,[19] whereas some authors, e. g. *Söllner* think that it did not take place even in the law of Justinian.[20] Anyway, no contradistinction between the subjective *b. f.* ("of the

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16 C. G. BRUNS, Das Wesen der "bona fides" bei der Ersitzung, Berlin 1872, especially 78ff.; E. FRAENKEL, Zur Geschichte des Wortes "fides", Rheinisches Museum 71 (1916), 187ff.

17 It is worth mentioning that Cicero sometimes also referred to *iudicia de mala fide* (Nat. d. 3.30.74), see C. A. CANNATA, 'Bona fides' e strutture processuali, vol. I, 257—273; see on this particular point p. 272.

18 An exhaustive list of the passages in the sources of Roman law concerning the *b. f.* in the subjective sense can be found in the proceedings of the conference, see namely M. TALAMANCA, La 'bona fides' nei giuristi romani: «Leerformeln» e valori dell'ordinamento, vol. IV, 1—312, see in this respect p. 246, fn. 674, p. 247, fn. 676, p. 248, fn. 678.

19 H. HAUSMANINGER, Die "bona fides" des Ersitzungsbesitzers im klassischen römischen Recht, Wien 1964. See similarly H. HAUSMANINGER & W. SELB, Römisches Privatrecht, 9th ed. 2001, 155f. The subjective interpretation of *b. f.* in the context of usucaption is reflected also in the recent German translations of the sources making use of the expressions *guter Glaube* or *gutgläubig* instead of *Treu und Glauben* (or *gute Treue*, as suggested, with reference to KASER, by M. J. SCHERMAIER, "Bona fides" im römischen Vertragsrecht, vol. III, 387—416, see on this particular point p. 390, fn. 13), see U. MANTHE (hrsg.), Gaius, Institutiones, Darmstadt 2004, 127 (Gai. 2.42); O. BEHRENDS, R. KNÜTEL, B. KUPISCH & H.-H. SEILER (hrsg.), Corpus iuris civilis. Text und Übersetzung, vol. I, 2nd ed., Heidelberg 1997, 65ff. (Inst. 2.6).

20 SÖLLNER (cit. fn. 14) thinks that the *b. f.* is mentioned in the sources always in the objective sense even in the context of usucaption, e. g. the *bonae fidei emptor* in the sources should be understood as a buyer who obtained a *res mancipi* through informal *emptio venditio* (that is a *bonae fidei contractus*) instead of *mancipatio*. Söllner's objective monistic view is not entirely new, see namely Bruns' similar theory (cit. fn. 16). Söllner could visibly not to take into consideration the proceedings of the conference in Padua. Söllner's view is

law of things") and the objective *b. f.* ("of the law of obligations") can be found in the sources of Roman law, which is forewarning.

It was in accordance with the sources of Roman law that in the literature of *ius commune* a not yet deliberate monistic approach to *b. f.* prevailed. A trend in the direction of subjectivisation in the interpretation of the content of *b. f.* seems to be likely in the Middle Ages also because the word *fides* meant, as a result of Christian influence, since the late antiquity mainly 'belief', and the equivalent expressions in the vernaculars *(buona fede, bonne foi, buena fe, guter Glaube)* could have strengthened this latter meaning.[21] Disregarding the appearance of the German term *Treu und Glauben* as the translation of the objective *b. f.* in the 16th century[22] as well as some sporadic remarks in this respect in the 18th century,[23] the contradistinction between the objective and subjective *b. f.* emerged just in the second half of the 19th century, namely in the German pandectistic literature. *Bruns* and *Wächter* described *expressis verbis* the difference between the psychological and ethical aspects of *b. f.* for the first time. While *Bruns* elaborated an objective monistic approach to *b. f.* (under which *b. f.* always appears as an ethical criterion, even in the case of the usucaption, whereas the subjective *b. f.* of a person is just a fact required by the ethical principle of the *b. f.*),[24] *Wächter* distinguished clearly between the "psychological" *b. f.* (called also "subjective" already by him), which plays a part in the case of usucaption on the one hand, and the ethical *b. f.* ("of the law of obligations") on the other.[25]

accepted by J. D. HARKE, "Liber homo bona fides serviens" und Vertragsgeltung, RIDA 52 (2005), 164.

21 Nevertheless the results of R. RODRÍGUEZ LÓPEZ's research (La 'bona fides' en los textos cristianos, vol. III, 255―277) speak against this assumption.

22 Cp. A. ERLER, Treu und Glauben, HRG, vol. V (1998), 319; R. MEYER, "Bona fides" und "lex mercatoria" in der europäischen Rechtstradition, Göttingen 1994, 64ff.

23 CH. MEISTER, De fide eiusque iure in usucapione et praescriptione, Gottingae 1741; S. HUSZTY, Jurisprudentia practica, Tyrnaviae 1766, vol. II, p. 14. The analytical approach in these works can be explained with the authors' natural law way of thinking.

24 BRUNS (cit. fn. 16), especially p. 98.

25 C. G. VON WÄCHTER, Die "bona fides" insbesondere bei der Ersitzung des Eigenthums, Leipzig 1871, see especially p. 59. As a forerunner of this theory is rated mainly R. VON STINTZING, Das Wesen von "bona fides" und "titulus" in der römischen Usucapionslehre, Heidelberg 1852, 120f., who thought that the "bona fides" of the unlawful possessor was negative (so identified it with ignorance), unlike C. A. MÖLLENTHIEL's view (being a pioneer in his time as regards the more thorough analysis of *b. f.*), Über die Natur des guten Glaubens bey der Verjährung, Erlangen 1820.

Wächter's dualistic theory could later become prevailing in Germany (and in Switzerland, too) also because of the fact that in the BGB (as well as in the German version of the Swiss ZGB) subjective and objective *b. f.* are designated with different and consistently applied terms (*guter Glaube* and *Treu und Glauben* respectively). This dualistic approach to *b. f.* became more and more widespread in the 20th century, and in some countries it led also *de lege lata* to terminological modifications.[26]

The organisers of the conference in Padua obviously chose the title of it considering the premise according to which there are two aspects of *b. f.*, as it is recognised also by a number of authors in the recent Italian civil law literature.[27] It is, however, difficult to say, whether the authors of the papers included in the volumes under review accept the distinction between the objective and the subjective *b. f.* In a significant part of the papers certain specific problems connected to *b. f.* are scrutinised, while the theoretical question, whether considering *b. f.* a homogeneous or a duplex category is right is not dealt with. As regards those authors who face the complexity of the category of *b. f.*, and sometimes analyse this problem more thoroughly, we can meet not negligible differences among their views.

A significant part of the authors dealing partly or fully with ancient (classical) Roman law — it is remarkable, that there are some of today's leading romanists among them — considers *b. f.* without any scruples as an objective category, and not only ignores the dualistic approach but does not refer at all to the

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[26] In Italian legal terminology, in order to designate the objective *b. f.*, the expression *correttezza (e buona fede)* introduced by the *Codice civile* of 1942 is used (even if not consistently) instead of the traditional expression *buona fede* meaning first of all the subjective good faith, cp. MERUZZI (cit. fn. 6), 165ff. The new Dutch BW introduced for objective *b. f.* the term *redelijkheid en billijkheid* substituting it for the traditional term *goude trouw*, cp. e. g. H. ANKUM, Römisches Recht im neuen niederländischen Bürgerlichen Gesetzbuch, in: Rechtsgeschichte und Privatrechtsdogmatik (ed. R. Zimmermann et al.), Heidelberg 2000, 110. Unfortunately it is not clear, not even in the light of Dutch legal literature (see e. g. HESSELINK [cit. fn. 8]), where this expression derives from. The (at least formally) equivalent German term "Redlichkeit und Billigkeit" occurs sometimes in the pandectists' works, see e. g. H. DERNBURG, Pandekten, 6th ed. Berlin 1900, I. 1, 303. For a similar modification of the Hungarian legal terminology in 2006 see the introductory part of the present study. Also in the Latvian *Civillikum* there is an — even if not very striking — terminological distinction between the objective *b. f.* (*laba ticiba* in Art. 1) and the subjective *b. f.* (*labticiba* in Art. 1065), see BALODIS (cit. fn. 8), p. 4.

[27] See G. GIAMPICCOLO, La buona fede in senso soggettivo nel sistema di diritto privato, in: Studi sulla buona fede, Milano 1975, 79; F. D. BUSNELLI, Buona fede in senso soggettivo e responsabilità per fatto «ingiusto», *ibidem*, 567; A. TRABUCCHI, Istituzioni di diritto civile, 40th ed. Padova 2001, p. 481, fn. 1.

different meanings of *b. f.* revealing themselves in the sources of Roman law.[28] Also *Antonio Fernández de Buján* belongs to these authors but he gives a more tinged description, so far as he points out that the fitting of the attribute *bona* to the word *fides* resulted in the objectivisation of the term.[29] Also *Ana Aleman Monterreal* regards the *b. f.* as a homogeneous objective category but she ascertains in this respect some historical development in the direction of transcending the seller's liability beyond the *dolus*.[30]

A few romanists, who belong typically to the somewhat younger generation of today's romanists, apply the distinction between the objective and the subjective *b. f.* also in relation to the ancient (classical) Roman law, without entering into the problem of this distinction.[31]

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[28] H. ANKUM, Il 'beneficium cedendarum actionum' del mandante di credito: un beneficio basato sulla buona fede nel diritto romano classico, vol. I, 173—188; C. A. CANNATA, 'Bona fides' e strutture processuali, vol. I, 257—273; F. GALLO, 'Bona fides' e 'ius gentium', vol. II, 115—153; F. GORIA, 'Bona fides' ed 'actio ex stipulatu' per la restituzione della dote: legislazione giustinianea e precedenti classici, vol. II, 241—263; A. GUARINO, Il gusto dell'esegesi: D. 19, 1, 50, vol. II, 265—271; P. LAMBRINI, 'Fundum Cornelianum stipulatus quanti fundus est postea stipulor': novazione oggettiva ed eccezione di dolo in diminuzione della condanna, vol. II, 377—395; F. LONGCHAMPS DE BÉRIER, La buona fede 'mortis causa'? Le disposizioni 'poenae nomine' e la 'querela inofficiosi testamenti', vol. II, 397—415; J. PARICIO, Apuntes sobre la 'actio fiduciae', vol. III, 49—57, G. SANTUCCI, 'Fides bona' e 'societas': una riflessione, vol. III, 359—385; A. RODEGHIERO, D. 18, 1, 34, 3: vendita di 'res furtiva' e principio di buona fede, vol. III, 235—254; SCHERMAIER (cit. fn. 19), vol. III, 387—416 (the English version of this study was already published before in: R. Zimmermann & S. Whittaker [ed.], Good faith in European contract law, Cambridge 2000); S. TAFARO, Buona fede ed equilibrio degli interessi nei contratti, vol. III, 567—608; L. VACCA, Buona fede e sinallagma contrattuale, vol. IV, 331—351; J. ZABŁOCKI, 'Ex fide bona' nella formula del comodato, vol. IV, 453—463; M. G. ZOZ, Il ruolo della buona fede nel contratto di trasporto marittimo, vol. IV, 541—562. In this group of papers can be mentioned the study by E. CANTARELLA, Regole di correttezza in materia contrattuale nel mondo greco, vol. I, 275—281.

[29] A. FERNÁNDEZ DE BUJÁN, De 'los arbitria bonae fidei' pretorios a los 'iudicia bonae fidei' civiles, vol. II, 31—58, see especially p. 46.

[30] A. ALEMAN MONTERREAL, La incidencia de la 'bona fides' en el 'quantum' indemnizatorio: a proposito de la responsabilidad del vendedor per los vicios o defectos ocultos, vol. I, 141—153. The author shows the continuity of the Roman rules of warranty relating to the quality of goods in modern Spanish law as well.

[31] M. V. SANSÓN RODRÍGUEZ, La buena fe en el ejercicio de los derechos y en el cumplimiento de las obligaciones desde la perspectiva del derecho privado romano, vol. III, 293—358 refers to the passage Gai 2.43 as a proof of the existence of the distinction between the objective and the subjective *b. f.* in classical Roman law (p. 294). The authors making use of the attributes "objective" and "subjective" also with respect to the *b. f.* of Roman law are as follows: D. DOZHDEV, "Fidem emptoris sequi": Good faith and price payment in the structure of the Roman classical sale, vol. I, 551—578; P. GARBARINO, Brevi osservazioni in tema di azioni di buona fede in diritto giustinianeo, vol. II, 191—202; V. MANNINO, Brevi note a margine dell'arbitrato 'boni viri', vol. II, 425—438; A. PALMA, Violazione del

There are also authors examining the complexity of the Roman notion of the *b. f.* more thoroughly. Some of them point out that the distinction between the objective and the subjective *b. f.* is a schematic simplification of the much more complicated reality but the image given by them is not always clear enough.[32] *Wojciech Dajczak*'s paper shows a likewise careful approach. The Polish romanist states that the term *b. f.* had more meanings already in the preclassic age, and since Cato maior it has been used also in the context of a person's state of mind. Dajczak visibly avoids to refer to the roots of an isolation of the subjective *b. f.* in this respect.[33]

In relation to the classical law clearer assumptions are allowed. Accordingly, e. g. *Antonio Díaz Bautista* assumes that since the age of Hadrian the term *b. f.* may have been used by the Roman jurists as a pronounced antonym of *mala fides*, thus in the subjective sense (as "credenza possessoria").[34] *Aloísio Surgík*, however, ascribes the application of the term *b. f.* in the subjective sense to the law of Justinian.[35]

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criterio della buona fede e risarcibilità del danno conseguente: brevi profili romanistici, vol. III, 27—48 (also with regard to modern law); A. PETRUCCI, 'Neque enim decipi debent contrahentes'. Appunti sulla tutela dei contraenti con un'impresa nel diritto romano tardorepubblicano e del principato, vol. III, 89—103; P. PICHONNAZ, Quelques aspects de la bonne foi (objective) dans la compensation en cas de faillite à Rome et aujourd'hui, vol. III, 105—123; L. SALOMÓN SANCHO, El concepto de buena fe en las Instituciones de Gayo. En concreto Gai 2, 51, vol. III, 279—292; A. TRISCIUOGLIO, 'Bona fides' e locazioni pubbliche nelle 'opiniones' di Ulpiano, vol. IV, 313—330.

32 A. BIGNARDI, Brevi considerazioni sulla funzione della buona fede nell' 'usucapio', in particolare nel pensiero di Paolo, vol. I, 207—224; R. CARDILLI, La «buona fede» come principio di diritto dei contratti. Diritto romano e America Latina, vol. I, 283—369. While analysing the content of *b. f.* in Roman law, Cardilli does not use the attributes "objective" and "subjective" but with respect to the modern (mainly Latin American) legal systems examined by him, he does. The Italian author has recently published the results of his research in a book as well (cit. fn. 6).

33 W. DAJCZAK, La libertà di applicazione della clausola generale della buona fede: osservazioni sulla prospettiva del diritto romano, vol. I, 409—427, see especially p. 416 with a reference to Cato agr. 14.3. The Polish romanist is an internationally acknowledged expert of the problems of *b. f.*, see comprehensively his monograph Zwrot 'bona fides' w rozstrzygnięciach dotyczących kontraktów u pravników rzymskich okresu klasycznego, Toruń 1998, 184, with a summary in English. A partly similar approach is characteristic of the paper of E. OSABA ('Fides' y 'bona fides' en la 'Lex Visigothorum', vol. II, 543—578), who states that in the *Lex Visigothorum* the objective and the subjective *b. f.* cannot be isolated as clearly as in modern legal systems (p. 565).

34 A. DÍAZ BAUTISTA, La buona fede nel senatoconsulto Giuvenziano, vol. I, 489—503 (with an interesting quantitative analysis of the wordings at relevant passages in the sources); similarly SANSÓN RODRÍGUEZ (cit. fn. 31), vol. III, 294.

35 A. SURGÍK, Da necessidade da boa-fé objetiva na ética profissional do advogado, vol. III, 541—566, see especially p. 547.

Mario Talamanca's monographic treatise deserves special attention also as constituting a book within the book, so far as this work of 312 pages amounts to more than the half of the extent of volume IV.[36] Apparently, professor Talamanca realised just during the completion of this treatise the fact, how much the distinction between the objective and the subjective *b. f.* is missing from the textbooks and manuals of both Roman law and civil law, like most contemporary romanists and civilists seem not to be fully aware of this distinction.[37] On the basis of this recognition Talamanca criticises *Kaser*'s famous *Handbuch* referring to the fact that Kaser did not see any difference between the possessor's *b. f.* and the *b. f.* in the *bonae fidei iudicia*.[38] However, we have to remark at this point that Kaser considered the *b. f.* on the basis of the objective monistic view which prevails not only in Austrian law but which can also be a plausible way of approach when researching the *b. f.* of Roman law. Under this view the *b. f.* of the *bonae fidei possessor* does not mean that kind of subjective *b. f.* which may arise even from a hardly founded mistake but much rather the well founded persuasion of a person acting with immaculate diligence, although mistaken in the particular case.[39]

The title of the conference in Padua gave not only professor *Talamanca* plenty to think about but in some respects it deceived other participants as well. In this way *Pierluigi Zannini* today admits not having noticed for a long while that the organisers chose as topic not the *b. f.* in general but the objective *b. f.* only. Starting from this "assumption in good faith", professor *Zannini* delivered in the conference a paper about *b. f.* as a requirement of usucaption. In his paper published in the proceedings of the conference the Italian romanist ascertains that he did not make such a big mistake when choosing the topic mentioned since Roman law did not isolate the objective and the subjective *b. f.* as expressly as the modern dualistic theory does. Moreover, according to *Zannini,* in order to avoid an exaggerated schematism it can be highly recommended to

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36 TALAMANCA (cit. fn. 18), vol. IV, 1—312.

37 TALAMANCA (cit. fn. 18), vol. IV, p. 9, fn. 24 mentions self-critically also his own textbook (Istituzioni di diritto romano, Milano 1990) among the modern Roman and civil law textbooks and manuals which do not oppose the objective and the subjective *b. f.* to each other.

38 See TALAMANCA (cit. fn. 18), vol. IV, p. 9, fn. 24. As to the description of the possessor's *b. f.* by KASER, Das römische Privatrecht, vol. I, 2nd ed. München 1971, 422f., Talamanca says that "non si può negare che colpisce la mancanza di qualsiasi riflessione sull'innegabile diversa struttura della *bona fides* nei due casi di applicazione". Nevertheless Talamanca does not prefer a schematic dualism. The great Italian romanist ascertains e. g. (pp. 244ff.) that Ulpian in the passage in D. 18, 6, 1, 3 did not refer either to the objective or to the subjective *b. f.* but to a kind of "bona fide agere".

39 As to the Austrian concept of *Redlichkeit*, see fn. 55f. KASER's view as regards the *b. f.* of the Roman law seems to be somewhat different as compared with SÖLLNER's (cit. fn. 14) absolutely objective monistic concept.

modern jurists, who prefer the dualistic approach to *b. f.*, to regard the experience of the sources of Roman law or simply the famous warning by Talleyrand ("et surtout … pas de zèle").[40]

Still stuck to the papers dealing with Roman law, *Alfredo di Pietro*'s view necessarily strikes the eye, who asserts, referring to *Meillet*'s etymological research, that *fides* is a substantive derived from the verb *credo*, and he also assumes a close semantical connection between the two words.[41] In relation to this highly problematical assumption it is worth pointing out among others that neither *Leonid Kofanov*, nor *Francesco Sini*, analysing the roots of *fides* in terms of the history of religion, have found any correlation between the Roman *fides* and the notion of belief.[42] It is not less important to consider in this respect that *Remo Martini* and *Dieter Nörr*, examining the relations between the Roman *fides* and the Greek *pistis*, deem in this respect not the subjective meaning of *pistis* ('belief') relevant but its objective, ethical meaning.[43] I remark at this point that as it emerges from the paper of *Rosalía Rodríguez López*, the subjectivisation of the meaning of *b. f.* was not carried out in the Christian literature of the Antiquity and of the Middle Ages, either.[44]

As regards the papers dealing with modern law, the authors usually refer to the fact that they are not concerned with *b. f.* in general but with the objective *b. f.* only (or with equity or the misuse of rights); several authors also stress the difference between the objective and the subjective *b. f.*[45] A few authors treat

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40 P. ZANNINI, Sulle tracce del concetto di buona fede, D. 41, 7, 5 pr., vol. IV, 465—473.

41 A. DI PIETRO, La 'fides' pubblica romana, vol. I, 505—549, see especially pp. 543f. (the text of this paper is in Spanish language). L. GUTIÉRREZ-MASSON, Actos propios y buena fe. En torno a Papiniano 3 quaestionum D. 50, 17, 25, vol. II, 273—292, assumes expressly an "equivalencia *fides—credo*" (p. 275), *nota bene*, he is doing it without any support or reference.

42 L. KOFANOV, Il carattere religioso-giuridico della 'fides' romana nei secoli V-III a. C.: sull'interpretazione di Polibio 6, 56, 6-15, vol. II, 333—345; F. SINI, 'Fetiales, quod fidei publicae inter populos praeerant': riflessioni su 'fides' e «diritto internazionale» romano (a proposito di 'bellum', 'hostis', 'pax'), vol. III, 481—539.

43 R. MARTINI, 'Fides' e 'pistis' in materia contrattuale, vol. II, 439—449; D. NÖRR, "Fides Punica" – "fides Romana". Bemerkungen zur "demosia pistis" im ersten karthagisch-römischen Vertrag und zur Rechtsstellung der Fremden in der Antike, vol. II, 47—541. As regards the etymology Nörr emphasises that "es abwegig wäre, sich etwa mit Hilfe von Etymologien auf die Suche nach einer in dieser Epoche noch fassbaren «ursprünglichen» Bedeutung der *fides* zu machen" (p. 538). Cp. D. NÖRR, Aspekte des römischen Völkerrechts, München 1989, as well as his "Fides" im römischen Völkerrecht, Heidelberg 1991.

44 R. RODRÍGUEZ LÓPEZ (cit. fn. 21), vol. III, 255―277.

45 G. ALPA, La buona fede integrativa: note sull'andamento parabolico delle clausole generali, vol. I, 155—172; A. FÖLDI, Rinascita del principio della buona fede oggettiva in Ungheria, vol. II, 59—98; A. FUSARO, Il ruolo della buona fede oggettiva nel diritto delle associazioni, vol. II, 99—114; P. GALLO, Buona fede oggettiva e trasformazioni del contratto, vol. II, 155—189; K. LUIG, Il ruolo della buona fede nella giurisprudenza della

the questions of *b. f.* both in the objective and in the subjective sense; they distinguish clearly between the two categories.[46] *B. f.* in the objective and in the subjective sense are opposed to each other in a highly suggestive way in the paper by *Anna de Vita*, who points out that objective *b. f.* sounds almost earsplitting for English lawyers since good faith means for them a subjective criterion.[47]

Corte dell'Impero prima e dopo l'entrata in vigore del BGB dell'anno 1900, vol. II, 417—424; A. PERULLI, La buona fede nel diritto del lavoro, vol. III, 65—87; P. RESCIGNO, Rimeditazioni sulla buona fede. Omaggio ad Alberto Burdese, vol. IV, 565—577. Some Italian authors do not speak explicitly about "buona fede oggettiva" but applying the clearer Italian technical term *correttezza e buona fede* they hint at the fact that they deal with the objective *b. f.*, see T. DALLA MASSARA, Frazionabilità della domanda e principo di buona fede, vol. I, 429—457; F. MERUSI, Buona fede e affidamento nel diritto pubblico: il caso dell'«alternanza», vol. II, 451—465; P. M. VECCHI, Buona fede e relazioni successive all'esecuzione del rapporto obbligatorio, vol. IV, 353—401. The German phraseology of the paper by B. KUPISCH, "Bona fides" und Bürgschaft auf erstes Anfordern. Zu einer Entscheidung aus der jüngsten Rechtsprechung des Bundesgerichtshofes (BGH) zum Rechtsmissbrauch, vol. II, 347—364 also manifests that the author deals with the objective *b. f. (Treu und Glauben)*. The following papers belong *mutatis mundis* also to this group: R. FAVALE, Nullità del contratto per difetto di forma e buona fede, vol. II, 1—30; F. NAPPI, Buona fede ed equità nell'estinzione dell'obbligazione per compensazione (Considerazioni sulla funzione di garanzia della compensazione), vol. II, 475—495; A. PALAZZO, Promesse gratuite e affidamento, vol. III, 1—25 (looking back also upon Roman law); S. SCHIPANI, Principi e regole per il debito internazionale dei paesi in via di sviluppo. La prospettiva romanistico-civilistica, vol. III, 417—458; P. SCHLESINGER, Invalidità di deliberazioni assembleari nelle società di capitali per «abuso» del diritto di voto?, vol. III, 459—469.

46 G. A. BENACCHIO, La buona fede nel diritto comunitario, vol. I, 189—200; A. GUZMÁN, La buena fe en el Código civil de Chile, vol. II, 293—321 (looking back also upon Roman law); F. G. SCOCA, Tutela giurisdizionale e comportamento della pubblica amministrazione contrario alla buona fede, vol. III, 471—480.

47 A. DE VITA, Buona fede e common law. Attrazione non fatale nella storia del contratto, vol. I, 459—487. Cp. F. D. BUSNELLI, Note in tema di buona fede ed equità, vol. I, 225—255, see especially p. 246. As for the subjective sense of good faith in English law, see furthermore R. GOODE, The concept of good faith in English law, Roma 1992, 4. This is not the case, however, as regards the English Sale of Goods Act (1893), art. 62 (b) or the American Uniform Commercial Code, art. 2, 103, where good faith is an objective criterion, see A. M. RABELLO, Buona fede e responsabilità precontrattuale nel diritto israeliano alla luce del diritto comparativo, vol. III, 125—227, see in this respect pp. 135 and 148. As for the traditional reservations of English jurists about good faith in the objective sense, see J. BEATSON, The incorporation of the EC Directive on Unfair Consumer Contracts in English law, ZeuP 4/1998, 958ff.; G. TEUBNER, Legal irritants: Good faith in British law or How unifying law ends up in new divergences, The Modern Law Review 61 (1998), 11ff.; E. MCKENDRICK, Good faith: a matter of principle?, in: A. D. M. Forte (ed.), Good faith in contract and property law, Oxford 1999, 44ff; R. BROWNSWORD, Two concepts of good faith, Journal of Contract Law 7 (1994), 198. For the reception of the objective good faith in English law see H. MACQUEEN, Good faith in the Scots law of contract: An undisclosed principle?, in Forte, op. cit., 5; BROWNSWORD (cit. in this fn.), 200ff; MCKENDRICK (cit. above), 54ff; MACQUEEN (cit. above), 9.

More Italian civilists throw light upon a terminological problem emerged in relation to the implementation of the EEC directive 93/13 in Italy. Thereby it is underlined that the reference to *b. f.* in the official Italian translation of the directive ("malgrado il requisito della buona fede") can be interpreted in the subjective sense, although in the versions in other languages it appears much rather in the objective sense. As the Italian legislator modified the *Codice civile* in order to implement the directive in question in 1996, an even more ambiguous formula ("malgrado la buona fede") was inserted into the text of the new article 1496*bis*, which can even more lead to a subjective interpretation of the category. Although a whole series of Italian civilists called attention to the terminological mistake, instead of the formulas "contrariamente ai precetti della buona fede" or "in contrasto con il principio di buona fede" advised by them, the strongly criticised previous wording holds on up to the present day.[48] In relation to this problem *Massimo Bianca* underlines that the requirements of the (objective) *b. f.* have to be interpreted uniformly in EC-law, and in this respect e. g. the directive 94/14/EC can serve as a guide.[49] Others, like *Salvatore Patti*, stress the importance of reaching back to the common (above all Roman law) fundamentals in terms of history of dogmatics.[50]

Within this group of papers *Alfredo Mordechai Rabello*'s monographic treatise has to be mentioned with special emphasis, since it analyses the questions of the relations between *b. f.* and precontractual liability offering an imposing comparative law panorama.[51] Rabello provides information also about the history of the development of the distinction between the objective and the subjective *b. f.*[52]

Some authors treat *b. f.* as a not quite homogeneous category. *Elio Casetta* refers to the fact that the Italian term "buona fede" is being used in various senses in Italian law but he analyses the significance of "buona fede" in Italian administrative law fundamentally on the basis of a kind of objective monistic

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48 Also BUSNELLI (cit. fn. 47), vol. I, 236 calls attention to the mistranslation, similarly M. BIANCA, Buona fede e diritto privato europeo, vol. I, 201—205. See also BENACCHIO (cit. fn. 46), vol. I, 195. S. PATTI, Significato del principio di buona fede e clausole vessatorie: uno sguardo all'Europa, vol. III, 59—64 deals specifically with the directive in question. A similarly doubtful wording — practically the same mistranslation — in the text of the Hungarian Civil Code (§ 209/B, see FÖLDI [cit. fn. 45], vol. II, 97f.) has recently been corrected in Hungary owing to a modification of the Hungarian Civil Code by the Act No. III of 2006 (see the introductory part of the present review).

49 BIANCA (cit. fn. 48), vol. I, 205. In the author's text the number "1994/44/CE" is to be read but in the light of the context it must be a printing error.

50 PATTI (cit. fn. 48), vol. III, 45.

51 RABELLO (cit. fn. 47), vol. III, 125—227. The author underlines the similarity between the Israeli regulation and the objective *b. f.* in art. 1337 of the *Codice civile*, see p. 146.

52 RABELLO (cit. fn. 47), vol. III, 136.

view.[53] *Juan Miquel* conceives the *b. f.* as a more or less homogeneous category, regarding it as the antonym of *mala fides*, and at the same time considering it as a legal principle.[54]

The Austrian authors call attention to the fact that in Austrian law *Redlichkeit* does not mean a subjective state of mind. The Austrian jurists consider *redlicher Besitzer* only that person who is not even guilty of negligence in holding his possession erroneously as lawful.[55] In this way, on the basis of their objective monistic concept of *b. f.* called *Redlichkeit*, the Austrian lawyers may correctly designate as "objective *b. f.*" the possessor's erroneous but still founded persuasion concerning the lawfulness of his possession.[56] It is self-evident that the "actual" objective *b. f.*, namely the so-called *b. f.* of the law of obligations is closely related to the *Redlichkeit* of the law of things, as it is manifested also terminologically in the ABGB (cp. § 863 [section 2]; § 914).[57]

As already referred to above, it is not only the objective monistic system prevailing in Austrian law that diverges from the dualistic approach to *b. f.* recognised also in respect of terminology[58] in German, Swiss, Italian, Dutch and Hungarian law, namely for the time being the subjective monistic concept of *b. f.* exists in a number of contemporary legal systems. Besides the French law several Latin American legal systems — developed generally under considerable impact of French law[59] — e. g. the Brazilian law serve as an example for this phenomenon. As Aloísio Surgík points out, "boa-fé" has been tradition-

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53 E. CASETTA, Buona fede e diritto amministrativo, vol. I, 371—387; a similar concept is reflected in the paper of C. CONSOLO, La buona fede internazionalprocessualistica ed il nostro «ricarburato» regolamento di giurisdizione, vol. I, 389—400, as well as of G. CUGURRA, La rilevanza della buona fede in tema di accordi ex art. 11 della l. 241 del 1990, vol. I, 401—407.

54 J. MIQUEL, Autonomia del diritto e principio generale della buona fede, vol. II, 467—474.

55 J. M. RAINER, La buona fede ('Redlichkeit') nel diritto austriaco, vol. III, 229—234.

56 In his paper entitled La buona fede oggettiva nelle regole del 'Codex Theresianus', vol. IV, 439—452, A. VÖLKL apologises, referring to the phrase *variatio delectat*, because of the fact that the "buona fede oggettiva" in the title of his study is not identical with the term appearing in the title of the proceedings of the conference. The Austrian author deals namely with the rules of the acquisition of ownership in good faith *a non domino* as regulated in the *Codex Theresianus*. In this draft of 1766 the term *guter Glaube* (VIII, 43) was used in this respect but the *b. f.* ought to be judged here on the basis of objective criteria. In this way this kind of *b. f.* does not correspond to the subjective *buona fede* in terms of the art. 1153 of the valid Italian *Codice civile* but much rather to the *buona fede* in the art. 534 (sect. 2) and 1189 of this code.

57 As it is known, the German technical term *Treu und Glauben* never occurred in the text of the ABGB, as instead of the German term *guter Glaube*, which has a subjective colour, we always find a term of objective character, *Redlich(keit)* in the text of the Austrian civil code.

58 Or perhaps only in respect of terminology, see namely fn. 64.

59 Cp. G. HAMZA, Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé moderne, Budapest 2005, 181.

ally[60] a completely subjective criterion in Brazilian civil law but recently a tendency has been manifested in the direction of its objectivisation.[61]

It is not easy to draw meritory conclusions on the basis of the above survey. It is beyond doubt that none of the authors of the nearly 80 papers published in the proceedings of the conference in Padua denies the *raison d'être* of the distinction between the objective and the subjective *b. f.*[62] It is another matter that some authors ignore this distinction, speaking about *b. f.* in an undifferentiated way (usually in the objective sense).

If we accept the dualistic approach to *b. f.*, then the question will arise, whether this distinction applies also to the classical Roman law (or at least to Justinian's law) or only to (certain) modern legal systems. Unfortunately it is not known, when the word *fides* took up the meaning 'belief' (maybe first in the Christian period), and it is not known either, whether the establishment of this new

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60 The traditional domination of subjective interpretation of *b. f.* in Brazilian civil law is in close connection with the fact — critically evaluated by C. LIMA MARQUES, Das BGB und das brasilianische Zivilgesetzbuch von 1916, in: E. Jayme & H.-P. Mansel (hrsg.), Auf dem Weg zu einem gemeineuropäischen Privatrecht, Baden-Baden 1997, 90 — that in spite of the wide-ranging influence of German law the general clauses of *Treu und Glauben* in the BGB (§§ 157 and 242) had only a limited impact on the Brazilian *Código civil* of 1916.

61 SURGÍK (cit. fn. 35), vol. III, 552ff., 566. As the Brazilian author remarks (p. 554), the Brazilian code of consumer protection promulgated in 1990 as well as the new Brazilian *Código civil* (entered into force in 2003) show some movement in the direction of the objectivisation of *b. f.* and in this way of the strengthening of the dualistic concept. This tendency is in accordance with the fact that the (new) Portuguese *Código civil* of 1966 has objectivised the *b. f.* of the law of obligations, too, see SURGÍK (cit. fn. 35), vol. III, 553f.; cp. J. F. SINDE MONTEIRO, Manuel de Andrade und der Einfluß des deutschen Bürgerlichen Gesetzbuches auf das portugiesische Zivilgesetzbuch von 1966, in: Jayme & Mansel (cit. fn. 60), 41f. SURGÍK (cit. fn. 35), 565f. advises a more intensive objectivisation of *b. f.* in respect of Brazilian civil law on the basis of Roman law tradition. Surgík ascertains critically that while in the Brazilian law of civil procedure basically the objective *b. f.* is getting across, the Brazilian act about advocates' ethical code promulgated in 1994 favours the subjective approach to *b. f.* The Brazilian author refers also to the sources and literature of Roman law, among others to the monograph by K. Z. MÉHÉSZ, Advocatus Romanus, Buenos Aires 1971. As to the traditional lack of objective *b. f.* in the contract law of the South-American countries, cp. CARDILLI (cit. fn. 32), vol. I, 350ff. The Chilean *Código civil* forms an exception in this respect, so far as there the dualistic approach prevails, cp. GUZMÁN (cit. fn. 46), see especially vol. II, 297ff.

62 Unfortunately not even these volumes devoted to "buona fede oggettiva" inform us, when exactly the deliberate distinction between the two aspects of *b. f.* specified with the attributes "objective" and "subjective" was established. The attribute "subjective" was already used by the founder of this distinction, WÄCHTER (cit. fn. 25). The formal opposition with these specific attributes is undoubtedly encountered by M. HORVAT, Bona fides u razvoja rimskoga obveznoga prava, Zagreb 1939, cited by H. KRELLER, Römische Rechtsgeschichte, 2nd ed., Tübingen 1948, p. 118, fn. 1, as well as by R. VOUIN, La bonne foi. Notions et rôles en droit privé français, 1939, cited by R. DESGORCES, La bonne foi dans le droit des contrats: rôle actuel et perspectives, Paris 1992, 19.

meaning had an influence on the legal sense of the *b. f.* in the ancient times. It is possible that it came to the subjectivisation of the *b. f.* of the law of things just in the medieval *ius commune*. Some romanists (Bignardi, Cardilli, Zannini) forewarn in terms of the application of this distinction, while Talamanca criticises Kaser's cautious, to some extent objective monistic concept.[63] The danger of the dualistic approach in research of Roman law cannot be denied, it can namely lead to a schematic interpretation of the sources.

The dualistic approach is not unproblematic as regards modern law, either. The experience of Austrian law shows clearly that not even the possessor's *b. f.* must necessarily be considered a subjective state of mind. The category of the "subjective *b. f.*" is especially problematic, when in a certain legal system the mere "good faith" is not enough for being qualified as a "bona fide" possessor but a persuasion based on a high degree of diligence is required. Accordingly, the application of the dualistic concept of *b. f.* is more reasonable in those legal systems (e. g. in German and Italian law), where the presumption of good faith is only rebuttable by means of evidence of pronounced bad faith or an error due to *culpa lata*. In other terms, the dualism of *b. f.* accepted in those legal systems requiring for the existence of the *b. f.* the lack of *culpa levis* (this is the case e. g. in Hungary) can be regarded rather as a formal one.[64]

If we wished to designate the objective *b. f.* in modern languages by technical terms which do not refer to faith at all, and in this way we spoke e. g. about fair dealing only,[65] then, on the one hand, we would break away from a long termi-

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63 As regards the propagation of the dualistic approach SANSÓN RODRÍGUEZ (cit. fn. 31), vol. III, 355 goes the farthest, so far as this author means that tracing back the objective and the subjective *b. f.* to a unified source would cause confusion in the understanding of these two independent legal institutions.

64 The German and Italian law require for the rebuttal of the presumption of good faith at least the evidence of *culpa lata*, see BGB § 932 (sect. 2: "grobe Fahrlässigkeit"), *Codice civile* art. 1147 (sect. 2: "colpa grave"). Therefore in these legal systems an actual dualism of *b. f.* prevails. As for the strict requirements of *b. f.* getting across in Hungarian court practice, see e. g. the sentence BH 1994: 77. Also in the Draft of a new Civil Code for Hungary (cit. fn. 4) there are relevant signs of a fundamentally objective concept of the possessor's *b. f.* (see the motivation of § 4: 47), in this way the dualistic concept of *b. f.* preferred explicitly by the Draft (see the official motivation of § 5: 77) is rather formal than actual. A similarly strict regulation seems to be laid down in Art. 3 (sect. 2) of the Swiss ZGB: "Wer bei der Aufmerksamkeit, wie sie nach den Umständen von ihm verlangt werden darf, nicht gutgläubig sein konnte, ist nicht berechtigt, sich auf den guten Glauben zu berufen". The French jurisprudence is less strict again, see F. TERRÉ & PH. SIMLER, Droit civil. Les biens, 6th ed. Paris 2002, 469. As to the similar Spanish rules, see GARCÍA SÁNCHEZ (cit. fn. 10), vol. III, 230.

65 For the notion of "fair dealing" see A. E. FARNSWORTH, The concept of fair dealing in American law, Roma 1993, 3; MEYER (cit. fn. 22), 79. The absolutely objective expression "fair dealing" can be compared with the similarly objective Italian term *correttezza* as well as with the Dutch expression *redelijkheid en billijkheid* since these expressions do not refer to "good faith", either.

nological tradition, and, on the other hand — assuming that the subjective *b. f.* is invariably called *guter Glaube, buona fede, bonne foi* etc. — we would alienate the two types of *b. f.* too much from each other.

If we, however, drew the "*b. f.* of the law of things" as well as the "*b. f.* of the law of obligations" following the Austrian model, namely on the basis of the objective monistic concept, into the terminological orbit of fair dealing *(Redlichkeit)*, in a certain sense we would re-establish the classical unity of *b. f.* Nevertheless in the case of such a paradigm shift we would not only have to take some terminological problems into account but also the destruction of a suggestive dogmatic distinction, which could serve as a highly useful dogmatic compass.

A further meditation on these problems is far beyond the scope of the present article. Anyway, it can hardly be doubted that a thorough clarification of the complex term of *b. f.* in terms of legal history and comparative law would be necessary. It is also hardly to be doubted that a well-founded regulation on the level of both national and European law can be worked out only on the basis of appropriate historical-comparative research.[66] Obviously in the course of this work the consideration of the proceedings of the conference in Padua will be more than useful.

SUMMARY

Remarks on the Notion of "bona fides"

ANDRÁS FÖLDI

The present article has been written on the occasion of a recent amendment of the Hungarian Civil Code by the Act No. III of 2006, which aimed among others to render unambiguous the distinction between the good faith in the objective sense (i.e. *Treu und Glauben*) and that in the subjective sense (i.e. *guter Glaube*). This modification relied upon the experience that Hungarian jurists were often unaware of the difference between the two types of good faith. Misunderstandings of this kind do not occur in Hungary only but also in Western Europe as well as elsewhere. The confusion in question is in connection with the traditional dominance of the monistic conception of *bona fides* determined by the Roman law tradition. The dualistic conception of good faith accepted

[66] Cp. PATTI (cit. fn. 48), vol. III, 64; SURGÍK (cit. fn. 35), vol. III, 566.

recently by the Hungarian legislation diffused at about the beginning of the 20th century and it led to modification of the legal terminology in several jurisdictions (in this way in the new Dutch Civil Code the technical term *redelijkheid en billijkheid* has been substituted for the traditional term *goede trouw* every time when there reference to the good faith in the objective sense is made).

The author tries to give a concise survey about the problem, how much the dualistic conception of good faith is present in the recent Roman law and civil law literature, with special regard to the Proceedings of the international conference held in Padua in 2001 with the title "Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea".

As far as the Roman law literature is concerned, it can be among others ascertained that some romanists (e.g. Bignardi, Cardilli, Zannini) express well-founded reservations concerning the exaggerated dualism.

The dualistic conception is somewhat problematical also as regards the modern law. Considering the regulation of the Austrian civil law it is not to be denied that even the possessor's good faith can be an objective requirement. The author concludes that a consequent application of the dualistic conception of good faith is possible only in those jurisdictions (e. g. in German and Italian law) in which the presumption of good faith is rebuttable only by evidence of pronounced bad faith or an error due to *culpa lata*. Since under Hungarian law the possessor's good faith has to be free even of *culpa levis*, the dualism accepted recently by the Hungarian legislation means rather a formal dualism than an actual one.

RESÜMEE

Anmerkungen zum Begriff der „bona fides"

ANDRÁS FÖLDI

Das ungarische Parlament hat mit dem Gesetz Nr. III vom Jahre 2006 einige Paragraphen des ung. ZGB vom Jahre 1959 mit der Absicht geändert, um zum Ausdruck zu bringen, dass die „bona fides" (im Weiteren: *b. f.*) im objektiven Sinne (also das Prinzip von Treu und Glauben) nicht identisch mit der *b. f.* im subjektiven Sinne (= guter Glaube) ist. Zur Gesetzesänderung gab jene Erfahrung den Anlass, dass die ungarischen Juristen die beiden Begriffe oft miteinander verwechselt haben. Ähnliche Missverständnisse um die *b. f.* sind

nicht nur in Ungarn, sondern auch in Westeuropa, und daher natürlich auch anderswo zu erfahren. Diese Missverständnisse sind mit der durch die römischrechtliche (dabei vorzugsweise durch die terminologische) Tradition bestimmten Herrschaft der monistischen Auffassung der *b. f.* verbunden. Die nunmehr auch im geltenden ungarischen Recht zum Ausdruck gebrachte dualistische Auffassung der *b. f.* verbreitete sich gegen den Anfang des 20. Jahrhunderts, und hat in anderen europäischen Ländern bereits früher zu terminologischen Änderungen *de lege lata* geführt (man denke etwa an die Einführung des Ausdrucks „redelijkheid en billijkheid" für die objektive *b. f.* im neuen niederländischen BW).

Der Verfasser der vorliegenden Studie versucht knapp zusammenzufassen, in wieweit der erwähnte Dualismus der *b. f.* in der neuesten römischrechtlichen und zivilrechtlichen Literatur, und zwar vor allem in den Akten der in Padua im Jahre 2001 mit dem Titel „Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea" veranstalteten internationalen Konferenz präsent ist.

Was die römischrechtliche Literatur angeht, stellt der Verfasser unter anderem fest, dass einige Römischrechtler (z. B. Bignardi, Cardilli, Zannini) bezüglich der Verbreitung der dualistischen Auffassung wohl mit Recht zur Vorsicht mahnen.

Die dualistische Auffassung ist auch angesichts der modernen Rechte nicht unbedenklich. Die Erfahrung des österreichischen Rechts zeigt anschaulich, dass nicht einmal die *b. f.* des Besitzers unbedingt im subjektiven Sinne auszulegen ist. Der Verfasser kommt zu dem Schluss, dass die folgerichtige Anwendung der dualistischen Auffassung der *b. f.* nur in denjenigen Rechtssystemen möglich ist, in denen (wie z.B. im deutschen BGB oder im italienischen C. c.) die Vermutung der Gutgläubigkeit nur durch den Beweis der prononcierten Bösgläubigkeit oder eines auf grobe Fahrlässigkeit zurückzuführenden Irrtums entkräftet werden kann. Da das ungarische Zivilrecht zum guten Glauben eine streng beurteilte Sorgfalt erfordert, ist die im ungarischen Zivilrecht neuerdings angenommene dualistische Auffassung der *b. f.* nicht als Realdualismus, sondern vielmehr als Formaldualismus zu betrachten.